

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al.,)	
)	
Plaintiffs,)	Civil No. 05-CV-0329 GKF-SAJ
)	
v.)	
)	
Tyson Foods, Inc., et al.,)	
)	
Defendants.)	
)	

**THE CARGILL DEFENDANTS' SURREPLY IN OPPOSITION TO
PLAINTIFFS' MOTION TO ALTER TEMPORAL SCOPE OF DISCOVERY**

Pursuant to the Court's Minute Order of April 29, 2008 (Docket No. 1692), Defendants Cargill, Inc. and Cargill Turkey Production, LLC ("the Cargill Defendants") hereby submit the following surreply in response to Plaintiffs' Cargill-specific reply in support of Plaintiffs' Motion to Expand the Discovery Period. (Mot. at Dkt. No. 1418; Reply at Dkt. No. 1668.)

A. The Cargill Defendants' Document Productions Have Not Been Limited to Those Growers Who Were Active in 2002 or Later.

Plaintiffs mistakenly assert that the Cargill Defendants have produced documents relating only to those growers who were active in 2002 or later. (Dkt. No. 1668 at 2.) The Cargill Defendants initially produced files for turkey growers who were active at anytime between 2002 and present, which included pre-2002 documents relating to those growers. See Exhibit 1, Affidavit of Theresa Hill ("Hill Aff.") ¶ 2. The Cargill

Defendants have also subsequently identified and produced by agreement historical turkey grower files for IRW turkey growers *regardless* of when those growers contracted with one of the Cargill Defendants. As Plaintiffs' attorneys should be aware, the Cargill Defendants began this production of pre-2002 documents over six months ago. See Exhibit 2, Affidavit of Chris Dolan ("Dolan Aff.").

B. The Cargill Defendants Voluntarily Agreed to Produce Every Category of Documents Identified by Plaintiffs Prior to Service of the Present Motion.

Plaintiffs' description of the parties' 2007 arrangement concerning Plaintiffs' requests for additional pre-2002 documents, Dkt. 1668 at 3-4, is at best incomplete. Pursuant to the Court's July 6, 2007 Order, the Cargill Defendants' attorneys met with Plaintiffs' attorneys on July 19, 2007. At that meeting, Plaintiffs' attorneys identified the categories of discovery in which Plaintiffs sought pre-2002 information and offered reasons for those additional requests.

The Cargill Defendants' attorneys memorialized these requests in a letter, making clear that they anticipated that Plaintiffs might identify additional categories of pre-2002 documents that it wanted. See Hill Aff. ¶ 3 and Exhibit A to Affidavit (setting forth the Cargill Defendants' understanding of the Plaintiffs' request for supplementation). Plaintiffs' attorneys, however, never identified any further categories of discovery or documents for pre-2002 discovery. See Hill Aff. ¶¶ 4-5.

With respect to the pre-2002 documents Plaintiffs had requested at the July 19, 2007 meeting, the Cargill Defendants did not contest or object to *any* of the categories of documents. When Plaintiffs failed to identify any additional categories or documents

they wanted, the Cargill Defendants nevertheless went ahead and, at considerable effort and expense, undertook to produce *all* responsive materials, without time limitation, in the categories that the Plaintiffs had identified. See Dolan Aff. ¶ 3, 4, 7. The first notice the Cargill Defendants had of Plaintiffs' desire for any further pre-2002 information was the filing of the present motion. See id.

There is no question that, as Plaintiffs' reply states, Plaintiffs reserved the right to request additional categories of documents, Dkt. 1668 at 3; the problem is that Plaintiffs *never made any such additional requests*. Plaintiffs thus completely failed either to follow the Court's directions for resolving the scope-of-discovery issue or to otherwise meet and confer with the Cargill Defendants before forging ahead with the present motion.

C. The Cargill Defendants Have Not "Improperly Withheld" Any Documents.

The accusation in Plaintiffs' reply that the Cargill Defendants have "improperly withheld" documents, Dkt. 1668 at 2, is mistaken. As previously noted, Plaintiffs unexpectedly and unilaterally abandoned the parties' agreed procedure for addressing Plaintiffs' claimed need for pre-2002 information and, without meeting or conferring with the Cargill Defendants on the issue, brought the present motion to expand the temporal scope of discovery. Plaintiffs' motion threw into question how the Cargill Defendants should address recently identified sources of documents the Cargill Defendants intended to review for possible production.

In addition to the extensive production of pre-2002 documents described above, counsel for the Cargill Defendants culled approximately 235 boxes of documents from two warehouses that might contain additional information responsive to the Plaintiffs' requests for pre-2002 documents ("Warehouse Boxes"). The vast majority of the information contained in these boxes is the same or similar to information already produced by the Cargill Defendants. See Dolan Aff. ¶ 6. For example, there are 87 boxes of Flock System Vouchers, which are the back-up tickets and invoices for the data that is entered into the Cargill Defendants electronic databases to generate the reports that the Cargill Defendants previously provided to Plaintiffs. As shown on the index, some of the information in these boxes relates to locations outside the IRW and is not responsive. See Hill Aff. ¶ 7, Exhibit C to Affidavit.

In light of Plaintiffs' motion, the Cargill Defendants determined that the only sensible approach to the Warehouse Boxes was to wait until the Court rules on Plaintiffs' request to expand the scope of discovery and *then* to conduct the document review under whatever standard the Court adopts. Indeed, Plaintiffs themselves are no stranger to this approach, and have themselves frequently sought extensions of their discovery obligations until the Court resolves disputes over the scope of those obligations. (See, e.g., Dkt. Nos. 1487, 1617, 1660, and 1663 (all relating to Plaintiffs' requests to postpone complying with the Court's privilege rulings, to which Plaintiffs have filed objections).)

In connection with recent negotiations over the Cargill Defendants' Rule 30(b)(6) designees, the Cargill Defendants have provided to Plaintiffs an index describing the contents of the Warehouse Boxes and have offered Plaintiffs' attorneys open access

(conditioned on certain non-waiver agreements) to the boxes. Plaintiffs have not yet reviewed these documents. See Hill Aff. ¶ 7, Exhibit B to Affidavit. Counsel for the Cargill Defendants also advised that any additional supplemental hard copy production is available at their office for Plaintiffs' review. Id. Plaintiffs' only response to these offers was by e-mail on April 29, 2008. See Hill Aff. ¶ 8, Exhibit D to Affidavit. Despite the pending Motion, the Cargill Defendants continue to attempt to work with Plaintiffs' counsel and timely respond when they make requests or inquiries.

The 200-some boxes of largely repetitive information is a minor fraction of the hundreds of thousands of documents the Cargill Defendants have already reviewed and produced to Plaintiffs. Indeed, Plaintiffs' attorneys themselves acknowledge that the Cargill Defendants have already produced more documents than all the other defendants combined. See Hill Aff. ¶ 9, Exhibit E to Affidavit. Plaintiffs' suggestion that the Cargill Defendants' approach is "improper" is simply in error.

D. Broadening the Scope of Discovery Would Impose Substantial Burdens on the Cargill Defendants.

Finally, Plaintiffs' suggest (without citation to any factual support) that the substantially broadened discovery Plaintiffs propose will not unfairly burden or impose unjustified costs on the Cargill Defendants. This argument is new, wholly speculative, and in fact untrue. Common sense alone dictates that a revision in the scope of discovery at this late date will require the Cargill Defendants to essentially repeat the huge and expensive document review they performed last fall, a review based on the Court's

existing Order and Plaintiffs' silence on any desire for any pre-2002 information beyond what they had already identified.

The facts bear this out. The Cargill Defendants have already spent nearly \$2 million in responding to Plaintiffs' discovery requests under the existing standard using the 2002-present. See Dolan Aff. ¶ 7. If the Cargill Defendants have to re-review thousands of boxes of documents a second time to expand the temporal scope of discovery under the same standard, their best estimate is that they would easily expend at least another \$2 million in doing so. See Dolan Aff. ¶ 8.

The burden is considerable, and would be particularly unfair given the fact that the extra burden could have been avoided had Plaintiffs either made their additional requests when asked or brought this motion in a more timely manner.

CONCLUSION

The Cargill Defendants' objections to the scope of Plaintiffs' discovery requests are not "frivolous temporal objections," as Plaintiffs claim. (Dkt. No. 1668 at 6.) On the contrary, the Court upheld these "frivolous" objections. (Dkt. No. 1207.) The Court's original compromise decision on the temporal scope of discovery was sound, and the Cargill Defendants urge the Court to leave that standard intact and to deny Plaintiffs' motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 2nd day of May, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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